THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV: 2015-04091

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO PART 56.3 OF THE CIVIL PROCEEDINGS RULES 1998 AND SECTION 6 OF THE JUDICIAL REVIEW ACT, CHAP. 7:08

Between

JACK AUSTIN WARNER

Claimant

and

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice James C. Aboud

Representation:

- Mr. Fyard A. Hosein S.C. leading Mr. Rishi P. A. Dass, Ms. Sasha Bridgemohansingh and Mr. Anil V. Maraj, instructed by N. D. Alfonso and Co., represented by Ms. Nyree D. Alfonso for the claimant.

- Mr. Douglas Mendes S.C. leading Mr. Michael Quamina, instructed by the Chief State Solicitor, represented by Mr. Sean Julien and Ms. Savitri Maharaj for the defendant.

Dated: 27 September 2017

JUDGMENT

Introduction

[1] Proceedings to extradite Mr. Jack Warner, the claimant, from Trinidad and Tobago to the United States of America began in September 2015. His attorneys filed these judicial review proceedings shortly after the Attorney General issued an authority to proceed ('ATP') to the Chief Magistrate. The ATP was issued pursuant to the Extradition (Commonwealth and Foreign Territories) Act, 2004, Chapter 12:04 ('the Act'). The Act governs the extradition of persons to commonwealth and foreign territories. In relation to foreign territories, an extradition can only take place after those territories are declared as territories to which persons may be extradited. To do so the executive of this country must first enter into an extradition treaty with the executive of the foreign country. The Attorney General will lay an Order in Parliament so declaring the foreign territory. The Order is made subject to negative resolution of Parliament and will recite the treaty. If no negative resolution is passed the Order is made. These Orders are made as subsidiary legislation under the Act. Such an order was made in 2000 in relation to the United States of America by virtue of the Extradition (USA) Order, Legal Notice 58/2000, ('the USA Order').

[2] The claimant is contending that the Attorney General exceeded his jurisdiction under the Act when he made the Order declaring the United States of America as a foreign territory. The claimant says that the extradition Treaty entered into between the two governments is not in conformity with the Act, something which the Attorney General was bound by the Act to certify before making an Order. The result, he says, is that the Order is void and an ATP cannot be issued pursuant to it. He also contends breaches of his rights to natural justice in the issuance of the ATP, in particular, his right to be heard. The Attorney General contends that the High Court is barred from enquiring into the validity of the Order, is prevented from interpreting the meaning of the Treaty, and alternatively, that the Treaty broadly conforms to the Act. He also contends that no principles of natural justice were breached in the issuance of the ATP.

Factual and procedural overview

[3] The claimant is a businessman, politician, former acting Prime Minister and former Vice-President of FIFA. United States prosecutors, through the United States District Court for the Eastern District of New York (Brooklyn), have charged the claimant for engaging in alleged criminal conduct while holding the position of Vice-President of FIFA.

[4] This is an outline of the events that led to these proceedings:

(1) On 20 May 2015 the USA indicted the claimant for serious offences (each with several counts), among them, these include:
   (a) Conspiracy to commit racketeering in violation of Title 18, United States Code, § 1962 (d); 1963 and 3551 *et seq.*;
   (b) Conspiracy to commit wire fraud in violation of Title 18, United State Code, § 1349 and 3551 *et seq.*;
   (c) Wire fraud in violation of Title 18, United States Code, § 1343, 2 and 3551 *et seq.*;
   (d) Conspiracy to launder monetary instruments in violation of Title 18, United States Code, § 1956(h), 1957(b), 1957(d) (1) and 3551 *et seq.*; and
   (e) Money laundering in violation of Title 18, United States Code, § 1956(a) (2) (A), 1956 (a) (2) (B) (i), 1957(a), 1957(b), 1957(d) (1), 2 and 3551 *et seq.*

(2) On 27 May 2015, the claimant, having learnt of the issuance of a provisional warrant of arrest to face these charges, voluntarily surrendered himself into custody. The provisional warrant was issued under the Act. He was taken before the Chief Magistrate and granted bail in the sum of TT$2.5 million dollars with certain conditions attached.

(3) On or about 23 July 2015 the United States of America, pursuant to the Act and the USA Order made a request to the Attorney General for the claimant's extradition in relation to the alleged offences. Documents supporting the request were also delivered.

(4) Between July and September the claimant's attorneys corresponded with the Attorney General demanding a right to be heard before the issuance of an ATP. There was a general election on 7 September 2015 and a new Attorney General, Mr Faris Al-Rawi, was sworn in on 9 September 2015. The previous Attorney General declined his requests. The new Attorney General gave him an opportunity to be heard on the basis of certain conditions, which the claimant rejected.

(5) On 21 September 2015 the Attorney General issued the ATP requiring the Magistrate to proceed with the case in accordance with the provisions of the Act.

(6) On 27 November 2015 the claimant applied for leave to apply for judicial review. On 22 January 2016, after a contested leave application, I granted permission for the claimant to apply for judicial review for, among other things, the following relief:

(a) A declaration that the USA Order purportedly incorporating the Treaty with the United States of America pursuant to section 4 of the Act is unlawful and null and void and of no effect;

(b) A declaration that the decision of the Attorney General to issue an ATP in respect of the request for the extradition of the claimant is unlawful and null and void and of no effect;

(c) An order of *certiorari* to quash the USA Order;

(d) An order of *certiorari* to quash the ATP;

(e) A declaration that section 4(3) of the Extradition Act is unconstitutional, null, void and of no effect; and

(f) An order striking down section 4(3) of the Extradition Act.

(7) On 3 February 2016 pursuant to the grant of leave, the claimant's attorneys filed a Fixed Date Claim supported by his affidavit of even date together with a supplemental affidavit on 17 March 2017. The Attorney General also filed an affidavit on 19 February 2016.

(8) On 24 March 2016 the United States of America filed an application to intervene in these judicial review proceedings. On 17 June 2016, after protracted submissions, I delivered a written judgment and dismissed the application. The judgment was appealed. On 16 December 2016 the Court of Appeal upheld my ruling.

(9) Extensive written submissions were exchanged by the parties, which concluded on 21 April 2017.

The affidavit evidence: a closer look

[5] The facts are not in dispute. Both the claimant and the Attorney General filed affidavits in this application. The claimant said that in 2015 he was the leader of the Independent Liberal Party. In May 2015, while campaigning for the upcoming general elections, he heard media reports suggesting that a request was made for his extradition to the United States of America. On 27 May 2015, he surrendered himself into custody. On that same day his Attorneys-at-Law, Mesdames N. D. Alfonso and Co, wrote the then Attorney General, Mr. Garvin Nicholas, to enquire whether the reports were true. The attorneys also requested that the claimant be given an opportunity to examine copies of the material in support of the request and to make submissions prior to the issuance of an ATP.

[6] On the day after his voluntary surrender on 27 May 2015 the claimant was released on bail in the sum of $2.5 million and subject to certain conditions, such as the surrender of his passport.

[7] On 3 June 2015 the Central Authority, which is the representative of a Requesting State in all extradition matters, sent a letter to the claimant with a copy of the provisional warrant of arrest attached. On 12 June 2015, the claimant's attorneys sent a further letter to the Attorney General indicating that no extradition process could be proceeded with unless there had been compliance with section 9(1) and (2) of the Act, namely, the issuance of an ATP. Disclosure of all material contained in the request was sought and a demand to be heard before the issuance of the ATP was articulated.

[8] By letter of 2 July 2015 Mr. Hallpike, Attorney-at-Law, wrote on behalf of the Attorney General to the claimant's attorneys indicating that extradition is a statutory scheme and there is no provision in the Act for representations to be made to the Attorney General before an ATP is issued. The requested documentation was not provided.

[9] On 25 July 2015 the claimant's attorneys again wrote to the Attorney General questioning the delay in the issuance of the ATP and renewing their request to be heard prior to its issuance.

[10] By letter dated 12 August 2015 Mr. Hallpike confirmed that a request for the claimant's extradition was received on 24 July 2015. He again advised that no assurance could be given that he would have an opportunity to make representations on the question of the issuance of the ATP. The letter also requested an extension of time to make a decision on whether the ATP should be issued to a date after the general elections. By letter of 18 August 2015 the claimant's attorneys objected to this extension of time. They said that the entire process initiated against their client was on the basis that the extradition was urgent. They called for the appointment of a delegate of the Attorney General to make the decision on the ATP and, again, demanded a right to be heard before making any decision. On 26 August 2015 Mr. Hallpike responded indicating that the Attorney General will determine the issue of the ATP in a lawful, fair and transparent manner.

[11] On 28 August 2015, 10 days before the general election, during one of the hearings before the Chief Magistrate, Mr. Khan S.C., lead counsel for the Attorney General, indicated that the Attorney General needed more time to consider his position in relation to the ATP. The Chief Magistrate gave the Attorney General until 16 September 2015 to make a decision on the ATP.

[12] Following the 7 September 2015 general elections, Mr. Faris Al- Rawi took the oath as the Attorney General. This was on 9 September 2015. Upon assuming office, he was briefed in relation to several matters including the claimant's extradition proceedings. At that time the pressing issue was whether or not an ATP should be issued in response to the extradition request. The Attorney General said that he considered the correspondence passing between the claimant's attorneys and the Office of the former Attorney General. He noted that the claimant's attorneys wanted to make representations on the issuance of the ATP and that the former Attorney General refused this request. He retained Mr. Mendes S.C. to advise him and decided that in the peculiar circumstances of this case, it would be consonant with the principles of fairness to allow the claimant to make representations as to whether or not the ATP should be issued.

[13] The Attorney General however testified that he was aware that the Chief Magistrate had given a deadline of 16 September 2015 for the issuance of the ATP. Due to the deadline, he caused Mr. Hallpike to write to the claimant's attorneys informing them of the decision to allow representations. He asked for a response by 4:00 pm of that day as to whether such representations would be made. But there was a condition: if the claimant elected to make representations he should agree to a new date being set at the next hearing before the magistrate. A copy of the extradition request was also attached.

[14] On 15 September 2015 the claimant's attorneys responded, complaining about the late delivery of the letter and deficiencies in the annexures. The Attorney General testified that these deficiencies were not intentional. The claimant's attorneys also took issue with the limited time given for a response. They did not indicate whether the claimant would

be making representations or not. On that same date (15 September 2015), Mr. Hallpike wrote to the claimant's attorneys further extending the time to noon on 16 September 2015 to say whether or not they wished to make representations, subject to the same condition. On 16 September 2015 the claimant's attorneys responded and declined the offer to make representations. They objected to his continued arrest on bail, saying it constituted a deprivation of his liberty, and refused to extend the 16 September 2015 deadline set by the magistrate. The Attorney General testified that in considering whether or not he should issue the ATP, he was concerned not to be rushed as he wished to give the matter careful consideration. On that same day, Mr. Hallpike wrote the Chief Magistrate to notify her of the Attorney General's intention to apply at the next hearing for a variation of her order that set the 16 September 2015 deadline.

[15] However, the Attorney General, after examining the brief and seeking counsel became satisfied that the ATP should be issued. During the next hearing before the Chief Magistrate on 21 September 2015, Mr. Lewis Q.C. presented the ATP and submitted that the issue of discharging the claimant had fallen away. The claimant's attorneys took issue with this and both parties were directed to file submissions. On 25 September 2015 the magistrate declined to discharge the claimant and remanded him on a continuing bond. This decision was not appealed.

[16] On 29 September 2015, the claimant's attorneys made a request under the Freedom of Information Act for disclosure of certain documents that had accompanied the extradition request. On 1 December 2015 a letter from the Central Authority indicated that it was working diligently to provide the requested information but there may be some delay in its collation and release.

[17] On 27 November 2015 the claimant applied for leave to apply for judicial review

[18] On 17 December 2015, during the hearing of the application for leave to apply for judicial review, Mr. Mendes S.C. indicated that Trinidad and Tobago and the United States of America had entered into an arrangement pursuant to section 8(3) of the Act.

The claimant did not know about this arrangement and on 18 December 2015 his attorneys wrote requesting full disclosure. By letter of 28 December 2015 Mr. Julien, of the Chief State Solicitor's Department, attached a certificate signed by the Attorney General which purported to confirm that a written arrangement existed between the two governments. The actual written arrangement, although requested, was not produced. Mr Julien pointed out that under section 8(5) of the Act a certificate was deemed conclusive evidence of any arrangement entered into by the two governments. This is what the certificate said:

> "In pursuance of the powers conferred by section 8(5) of the Extradition (Commonwealth and Foreign Territories) Act 1985 as amended, I hereby certify under the authority of the Attorney General that an arrangement has been made with the government of the United States of America in the case of Jack Warner that, if he is returned to the United States of America, Jack Warner will not, until he has left or has been free to leave the United States of America, be dealt with in the United States of America for or in respect of any offence committed before his return other than (a) the offence in respect of which he is returned; (b) any lesser offence(s) proved by the facts proved before the magistrate on the extradition proceedings leading to his return; or (c) any other offence(s) being an offence in respect of which the Attorney General may consent to his so being dealt with."

[19] The certificate was issued on the same day as the ATP.

A general overview of the protection of the rights of persons facing extradition

[20] In its written evidence to the House of Lords Select Committee on Extradition Law (2014), the UK human rights body, Liberty (The National Council for Civil Liberties) said this (at para. 2):

> "Extradition permits the forcible removal to a foreign country of a person resident in the UK who may have no connection with the foreign jurisdiction. It has a profound and often irreversible effect on all aspects of a person's life, including their mental and physical health. Once extradited, a requested person is separated from friends, family and their

> emotional support network, considered a fugitive from justice and a flight risk, generally imprisoned on arrival and potentially held in custody for a full pre-trial period. Detention conditions can vary greatly from the UK and in some jurisdictions can mean solitary confinement. The costs and challenges of mounting a defence overseas can also be crippling."

[21] The inconvenience and hardship of individuals facing extradition must however be balanced against the inherent desirability of extradition treaties. There is no gainsaying the fact that the fundamental purpose of extradition is to bring criminals to justice. In a world increasingly beset by global lawlessness, victims of crime, whether they may be individuals, states, or organisations, should not be left without redress. In examining the fundamental purpose of extradition, it is imperative to recognise that nations, through avenues of reciprocity and comity, have a mutual interest in ensuring that persons who are jurisdictionally out of reach of their law enforcement agencies are nonetheless brought to justice. They therefore place faith in and accept, within certain broad limits, each other's criminal justice systems.

[22] In the field of extradition law, these two counterbalancing forces are at play: the protection of the due process rights of fugitives who face upheaval and uncertainty when delivered into the hands of foreign prosecutors and the protection of the rights of States, in their mutual interests, to collaborate in bringing these fugitives to justice. Certain foundational principles have emerged that seem to synthesize the interests of states and individuals alike. In *Extradition Between Canada and the United States*, *Gary Botting, 1st ed.*, an insight is given into how these aims are synthesized:

> "Extradition procedure has been governed by longstanding 'rules' (more accurately, assumptions, principles, axioms and maxims) that have survived in rudimentary form in treaties and legislation. These 'rules' include:
>
> - The rule of the pre-existent Treaty: A bilateral Treaty or multilateral convention or agreement is usually a condition precedent to extradition.
>
> - The rule of executive prerogative: Extradition is ultimately an executive decision in accordance with the law.

- The rule of enabling legislation: Treaties are not enforceable without the existence of domestic legislation that authorises the Executive to act.

- The 'extraditable offence' rule: A crime alleged against an individual facing extradition must be listed or described in an agreement or a Treaty.

- The rule of dual criminality: Crimes alleged against an individual facing extradition must be criminal in the laws of both nations.

- The rule of non-inquiry: Where an extradition Treaty exists the fairness of the laws and judicial system of the Requesting State is assumed.

- The rule to extradite or prosecute: When an extradition request is made, the Requested State may choose either to extradite or prosecute the accused.

- The rule against double jeopardy: Extradition must not be granted where the accused has already been prosecuted or punished for the same offence.

- The rule of specialty: Prosecution of an extradited person is restricted to the specific charges alleged in the extradition request.

- The 'political offence' exception: Persons are not to be extradited to face prosecution for crimes of a strictly political character."

[23] These principles are largely recognised in most extradition acts. It is not unreasonable to expect that any court would be obliged to ensure that deviations from these principles are minimised. While the case of *Ferguson and Galbaransingh v. The Attorney General, Civ. App. 2010-185 (unreported)* is often relied upon to support the need for strict compliance in cases of extradition, it must be noted that this case dealt with very specific due process procedural safeguards that were overstepped in proceedings before the Magistrate. Although the *ratio* does not easily fall into line with the specific issue of jurisdiction that is before this Court it is nonetheless essential for the Court to adopt a very cautious approach.

The statutory framework: the 1985 Act or the 2004 Act?

[24] In essence, the claimant's case is that the Treaty that is recited in the USA Order is not in conformity with the Act and is therefore void. A preliminary question that must be answered, when comparing the Treaty provisions with the statutory provisions, is in which Act of Parliament the non-conformity must be established. There are two Acts of Parliament at play in this case.

[25] At the time that the Treaty was made on 4 March 1996 between the then Prime Minister, Mr Basdeo Panday and the then United States Ambassador to Trinidad and Tobago, Mr Warren Christopher, the Act in force was the *Extradition (Commonwealth and Foreign Territories) Act 1985, Act No. 36 of 1985* ('the 1985 Act'). The USA Order was made on 27 January 2000. Pursuant to the 1985 Act it was laid in Parliament subject to negative resolution. No negative resolution having been passed, it became law. The 1985 Act was amended by Act No. 12 of 2004 (*An Act to amend the Extradition (Commonwealth and Foreign Territories) Act, 1985)*, which was assented to on 2 April 2004. A major amendment involved the definition of extraditable offences. In the 1985 Act, the offences were enumerated in a schedule that contained an exhaustive list of almost every known indictable offence at that time. The 2004 amendment provided a different formula at section 6, marrying an eliminative and enumerative method for identifying extraditable offences and, in the case of foreign declared territories, requiring that, for extradition to those territories, the offences would be provided for in a Treaty document. The amendments were consolidated and included in the laws of Trinidad and Tobago in Chapter 12:04 ('the 2004 Act').

[26] Mr. Hosein S.C., for the claimant, submitted that the conformity must be examined in relation to the 2004 Act. He said that it is erroneous to suggest any relation-back to the 1985 Act, and that the Treaty provisions must be compared with the law in force today. He said that the legislature and its corps of draftspersons have a continuing obligation to revisit Orders made under previous versions of their enabling legislation to ensure that

the Orders are likewise updated. This would require the making of a new extradition treaty and laying another Order before Parliament. Most of his arguments—they revolve around provisions of the Interpretation Act Chap. 3:01—would be apposite in cases involving the interpretation of the precise meaning of subsidiary legislation after an amendment of its enabling statute was effected. The meaning of the subsidiary legislation would obviously depend on the meaning of the currently enacted enabling legislation, at the time that the enquiry is made. But this is not such a case. The question for the Court to determine is the validity of the USA Order at the time it was made in 2000 and to scrutinise it to determine whether at the moment it came into force, the Attorney General could be said to have exceeded his jurisdiction. That parliamentarians should revise subsidiary legislation that is overtaken by amendments to their enabling legislation is salutary. In the event that the meaning of subsidiary legislation is questioned after the amendment of its enabling legislation, the failure to amend the subsidiary legislation may have adverse effects on those who wish to rely on its provisions. The case before me is not one that is directed to reliance on the meaning of subsidiary legislation but rather to the jurisdiction of the Attorney General to make it. It is a time-specific enquiry as to jurisdiction only.

[27] Mr. Mendes admitted that the Treaty is more in conformity with the 2004 Act than the 1985 Act but despite the advantages in so submitting, he felt duty bound on the basis of common sense to submit that an Order made in 2000 could not rationally be held to be non-compliant with an Act that was passed some four years later. As a matter of logic, I agree with him. The 2004 Act plainly attempted to provide better safeguards for persons facing extradition, but that is beside the point in deciding which Act should be scrutinised. The analysis of the Attorney General's jurisdiction will be based on an assessment of conformity between the Treaty recited in the Order and the 1985 Act. Nonetheless, where it is material, I will examine the provisions of both Acts.

[28] The entire case revolves around the meaning and effect of section 4 of the 1985 Act (the sections are identical in both Acts). Under the rubric *foreign territories* section 4 says this:

> 4. (1) Where a Treaty has been concluded, whether before or after the commencement of this Act, between Trinidad and Tobago and any foreign territory in relation to the return of fugitive offenders, the Attorney General may, by Order subject to negative resolution of Parliament, declare that territory to be a foreign territory (hereafter referred to as a declared foreign territory) in relation to which this Act applies, and where any such Order so declares, this Act applies in relation to that territory; and any such Order may provide that this Act applies in relation to that territory subject to such exceptions, adaptations, modifications or other provisions as may be specified in the Order and, where any such Order so provides, this Act applies in relation to that territory subject to such exceptions, adaptations, modifications or other provisions.
>
> (2) An Order shall not be made under subsection (1) unless the Treaty—
>
> > (a) is in conformity with the provisions of this Act, and in particular with the restrictions on the return of fugitive offenders contained in this Act; and
> >
> > (b) provides for the determination of the Treaty by either party to it after the expiration of a notice not exceeding one year
>
> (3) Any Order made under subsection (1) shall recite or embody the terms of the Treaty and shall not remain in force for any longer period than the Treaty; and the Order shall be conclusive evidence that the Treaty complies with the requisitions of this Act and that this Act applies in relation to the foreign territory mentioned in the Order, and the validity of the Order shall not be questioned in any legal proceedings whatever. (emphases added)

[29] The thrust of the claimant's case is that the Treaty does not conform to the 2004 Act. The language of subsection (2) is imperative in that it demands conformity, in particular, with the restrictions on the return of fugitive offenders. The claimant also says that the Court's jurisdiction to question the validity of an Order cannot be prevented by the conclusive evidence and ouster provisions in section 4(3). Finally, the claimant argues that he had a right to be heard before the issuance of the ATP. The defendant's case is that the court has no jurisdiction to interpret the Treaty, that its jurisdiction to question the validity of the Order is ousted by section 4(3), and that the Treaty broadly conforms with the 1985 Act. The right to be heard is denied.

The issues

(1) Whether the Court has jurisdiction to determine the validity of the USA Order by
   (a) interpreting the Treaty which is recited in the Order, or
   (b) disregarding the ouster clause and the conclusive evidence provision at section 4(3).

(2) If so, whether the test of conformity between the Treaty and the Act requires strict compliance or broad conformity and, if the latter, whether the rights of the claimant are compromised by a broad conformity test.

(3) Whether the claimant is entitled to make representations to the Attorney General before he decide to issue an ATP.

(1) The jurisdiction of the court to determine the validity of the USA Order in light of the ouster and conclusive evidence clauses and the issue of whether the Treaty may be interpreted

The submissions

[30] It is the claimant's submission that the section 4(2) requirement of conformity between the Treaty and the Act provides a safeguard that does not apply to Commonwealth territories. Commonwealth territories share similar judicial systems. It applies to foreign territories because extradition to them requires treaties, and their legal systems may be vastly different from our own. It is worth mentioning at this point that the Attorney General's power to "make an Order" under section 4 is not unilateral. The Order that he makes is subject to the negative resolution of Parliament. The volition of Parliamentarians is not removed from the process. Within the timeline that an Order is laid in the House (I believe in Trinidad and Tobago it is 42 days), they have the opportunity to peruse the Order and Treaty recited in it and to pass a negative resolution if, to their minds, the Treaty is not in conformity with the Act.

[31] Whether the Treaty conforms to the Act is a question of fact not law. Parliament, it seems to me, entrusted the Attorney General to decide as a question of fact whether the Treaty conformed to the 1985 Act and to put his findings before Parliament for their approval or disapproval. An error of fact or error of law goes to jurisdiction with equal force (see: *Re Racal [1981] A.C. 374, 383, HL (per Lord Diplock)*). The cases cited by the claimant that assert the court's power to review excesses of jurisdiction in the making of subordinate legislation must be read in the context of the presumed parliamentary oversight contained in section 4. However, such Parliamentary oversight ought not to be used as a cover for any lapses of judgment by the Attorney General. In *R v. Secretary of State for the Home Department, ex parte Javed [2002] Q.B. 129*, the Minister, and it seems the members of Parliament themselves, came to wrong findings of fact as to whether Pakistani women and members of the Ahmadi faith faced a serious risk of persecution when he issued an Order under the Asylum and Immigration Appeals Act 1993 (UK). So, the striking down of *ultra vires* subordinate legislation, even with Parliamentary oversight, is not beyond the reach of the court.

[32] Section 4(2) is not concerned with procedural rights for example, prescribing time limits, or requiring service of a notice, but with matters of tangible substantive importance.

[33] The claimant has launched a powerful argument that supports the striking down of the conclusive evidence and ouster clauses in section 4(3). The arguments are based on common law and constitutional grounds. The cases that they rely on for example, *Khawaja v. Secretary of State for the Home Department [1983] 1 All ER 765, Eshugbayi Eleko v. Government of Nigeria (Officer Administering) [1931] All ER 44* and *Re Racal [1981] AC 374, 383 HL* establish that "where the exercise of an executive power depends upon the precedent establishment of an objective fact, it is for the court, if there be a challenge by way of judicial review, to decide whether the precedent requirement has been satisfied" (per Lord Scarman in *Khawaja).*

[34] The common law position on ouster clauses is that the body in question is not allowed to determine the extent of its own jurisdiction. This was the position before *Anisminic v*

Foreign Compensation Board [1969] 1 All ER 208: see *Fordham, Judicial Review Handbook, 6th ed. (2012), Michael Fordham, Hart Publishing.* The claimant's argument is based on an excess of jurisdiction through error of precedent fact or error of law. Either of these is sufficient to void a decision: *Wade and Forsyth, Administrative Law, 11th ed. OUP at p.612-614.* "Shall not be questioned" clauses have been similarly rejected by the courts in excess of jurisdiction challenges. The legislative intent is plainly that the Treaty should conform with the Act, and to preclude the Attorney General from making an Order if the Treaty was dissonant. Like every public law power it must be exercised within its stipulated ambit. In *Eleko* it was held that "If the Court fails to stand guard over facts and requirements expressed objectively in the Act, it surrenders the rule of law to the rule of executive discretion. It is essential, therefore, that where the exercise of executive power depends upon the precedent establishment of an objective fact, the Courts will decide whether the requirements have been satisfied".

[35] The claimant relied on the powerful statement of Lord Diplock in *Re Racal* at p. 383:

> "The breakthrough made by *Anisminic* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of fact that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question, with the result that the decision they reached would be a nullity."

[36] On the constitutional front, the claimant argued that it would be a breach of the separation of powers doctrine if ouster clauses prevented the scrutiny of courts in judicial review proceedings. The separation of powers requires that the power to interpret a statute be secured as the exclusive function of the judiciary. In *Brantley & Ors v Constituency Commission & Ors (St. Christopher & Nevis) [2015] UKPC 21 at [21]* the Judicial Committee expressed the view that a consequence of the protection of the law guarantees was that any purported legislative ouster of judicial oversight would not be effective to exclude the court's jurisdiction in fulfilment of the constitutional right to the protection of the law. In the main, the claimant's objection to the ouster and conclusive evidence

clauses is based on the idea that the legislature is constitutionally incapable of immunising an inferior tribunal or authority from judicial review.

[37] Mr. Mendes submitted that this Court is barred by section 4(3) of the Act from enquiring into the validity of the USA Order. According to him, any determination as to the Order's conformity with the Act necessarily entails an interpretation of the Treaty provisions recited in the USA Order. This Court, he says, has no jurisdiction to entertain any challenge to the Treaty making power of the Executive or to interpret the Treaty because it is not incorporated into the domestic law of Trinidad and Tobago. He relied on *JH Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry [1990] 2 A.C. 418* where the House of Lords was asked to construe the terms of a Treaty to find that an international body was constituted as the agent of its members for the purposes of domestic law. In my view, an examination of the wording of the Treaty recited in the Order does not involve an interpretation of its terms in the sense of making a substantive declaration as to whether any of its articles grant or remove the rights of any person. The enquiry is narrowly limited to determining as a question of fact, the level of conformity between the language of the Treaty and the language of the Act. In that sense, I do not believe that the Court is precluded from examining the wording of the Treaty recited in the Order, and I do not think that *Rayner* has any useful application in this case (see for example, the statements of Lord Griffiths at p. 500, to which I will refer later in this judgment).

[38] Mr. Mendes also referred me to two cases, *National Provincial and Union Bank of England v. Charnley [1924] 1 KB 431*, (which was followed in *Re C.L. Nye Ltd. [1971] 1 Ch. 442)* and *R v Registrar of Companies ex parte Central Bank of India [1986]1 QB 1114.* Both dealt with conclusive evidence clauses in the context of decisions made by the Registrar of Companies. The certificates in question created charges over land and were issued by the Registrar in error because the information supplied to him was incorrect. The legislation contained a conclusive evidence clause. In *ex parte Central Bank of India,* Mr. Mendes relied on the judgment of Slade LJ who held that the conclusive evidence clause "by itself shows the intention of the legislature that the

Registrar is to have jurisdiction finally and conclusively to determine the question whether or not the requirements of section 95(1) have been complied with in any given case and that he cannot be said to be acting beyond his powers even if he made an honest error of fact or of law or of mixed fact and law in the course of determining this question. In the present case there has therefore been no usurpation by the Registrar of powers which he did not have." However, Slade LJ also noted at p. 1176A that there was no unqualified rule that an ouster clause would not protect a public authority: "The presumption that errors of law are reviewable is only a presumption, and it is accordingly rebuttable".

Analysis

[39] Ouster clauses curtail the Courts' powers of judicial review and strike at the heart of their constitutional function of upholding the rule of law. The common law power of judges to review the legality of administrative action is the cornerstone of the rule of law and one that is jealously guarded. Reid L.J. in the landmark decision in *Anisminic* said this at p. 212:

> "A statute provides that a certain order may be made by a person who holds a specified qualification or appointment, and it contains a provision, similar to section 4(4), that such an order made by such a person shall not be called in question in any court of law. A person aggrieved by an order alleges that it is a forgery or that the person who made the order did not hold that qualification or appointment. Does such a provision require the court to treat that order as a valid order? It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly—meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court."

[40] Again, there is this statement in Wade and Forsyth in *Administrative Law, 10th edn., at p. 610*:

> There is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound

> policy since otherwise administrative authorities and tribunals would be given uncontrollable power and violate the law at will.

[41] The ouster clause in section 4 seeks to prevent review of the validity of the USA Order. As the defendant has submitted, the legislature has tasked the Attorney General with construing the Treaty and determining its conformity with the Act. However, it cannot simply be assumed that the Attorney General diligently carried out this task, correctly interpreted the Treaty and accurately construed the Act so as to ensure consistency between both documents. It is the courts that are tasked with confirming the validity of any subsidiary legislation under challenge for errors of precedent fact or errors of law in its promulgation. Insofar as the authorities are concerned, I am more persuaded by the reasoning in the 2015 Privy Council case of *Brantley* than the reasoning of Slade LJ in the 1986 case of *ex parte Central Bank of India*. In my opinion, the validity of the USA Order is subject to review by this Court so as to ensure that it was made in accordance with the requirements in section 4.

[42] With respect to the court's power to interpret a Treaty, I am not persuaded by Mr Mendes's argument. An examination of the USA Order will reveal that it simply declares the USA a foreign territory for the purposes of extradition. As Mendonça J.A. stated in *Ferguson v. AG (2010)(Civ. App. 185/2010 at para. 103*:

> "The schedule to the order, as paragraph 2 indicates, recites the Treaty. There is however nothing contained in the order that could lead to the conclusion that it incorporates the terms of the Treaty into domestic law as the Appellants contend. The Treaty is contained in the order to satisfy the terms of section 4(3) of the Act which requires that the order recite or embody the terms of the Treaty".

[43] It is not the intention of this Court to launch an attack on the contents of an unincorporated Treaty, or to enforce anyone's rights under it. Templeman L.J's cautions in *Rayner* at p.476 which the defendant relied on, are therefore inapposite. He said this:

> "A Treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of

> treaties… Except to the extent that a Treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce Treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual".

[44] Griffiths L.J. at p. 500 of *Rayner*, contributed this useful comment that I prefer:

> "Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international Treaty arise where domestic legislation, although not incorporating the Treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation… But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a Treaty and when and what the terms of the Treaty are, are questions of fact. The legal results which flow from it in international law, whether between the parties *inter se* or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts".

[45] The purpose of the enquiry is to determine the level of conformity between the Treaty and the Act. It is an evidential enquiry, based on fact. It is not to determine anyone's rights under the Treaty. There is therefore no legal prohibition against an examination of the wording of the Treaty with that purpose in mind.

[46] In my opinion, the Attorney General was mandated to certify as a precedent question of fact, whether the Treaty conformed with the Act. One troubling aspect in this case is that Parliament reserved unto itself the right to question his determination of fact by negative resolution. All of the cases that I have examined have dealt with decisions of inferior tribunals (no disrespect is intended by that phrase), public authorities, and of ministers purporting to carry out functions given to them by Parliament. The decision maker in this case is not one person but a group of persons namely, the Attorney General who laid the Order in the House, and the Parliamentarians who found no fault whatsoever with the Order or the Treaty embodied in it. There are no hard and fast rules that command courts to uphold ouster clauses and conclusive evidence clauses. If so, one of the critical functions of the judiciary would be surrendered without a fight.

[47] The question whether an ouster clause or a conclusive evidence clause is effective is case sensitive and dependent, I think, on the character and purpose of the enabling legislation in which they are found. The seriousness of the effects that an error of fact or law will produce must also be considered. If these errors affect the fundamental right guarantees in the Constitution then the need for an enquiry is made plainer. *Charnley* and *ex parte Central Bank of India* concern the creation of charges against property by busy registrars of companies who, it seems to me required, as a matter of administrative efficiency, finality in the discharge of their functions. These functions are a far cry from the function of the Attorney General in laying the Order before Parliament. If a Treaty does not conform with the Act fundamental human rights issues will arise which are more insidious than those found in an erroneous and constitutionally unprotected certificate of charge. It must be recognised that Parliament sought to insulate not only the Attorney General in laying the Order before the House, but all of its members who by a negative resolution may have cured any potential defects. The extent or reach of the protection is immaterial. I have therefore come to the conclusion that this Court will disregard the section 4(3) ouster and conclusive evidence clauses.

(2) Whether the test of conformity between the Treaty and the Act requires strict compliance or broad conformity and, if the latter, whether the rights of an accused person are compromised by a broad conformity test.

[48] Before analysing the ways in which the Treaty is said to lack conformity with the 1985 Act (or indeed the 2004 Act) I must first ask myself the question, what level of conformity is required. For one thing to be in conformity with another, it should be correspond in form, nature or character. But does the Act require exactitude so that a Treaty made between two sovereign states with different judicial systems should exactly duplicate all the material provisions of the domestic legislation? It must be remembered that the Treaty, like any commercial contract, is the product of a negotiation exercise with two independent contracting parties. Each comes to the table seeking assurances on the basis of their differing legal systems. The end result of their negotiations is a document that ostensibly contains the bargains that they have reached in arriving at their agreement.

In the case of a Treaty, there might be numerous subterranean matters of international diplomacy or international trade or geopolitical alliance issues that form part of the prerogative of sovereign states to recognise or reject. It is not inconceivable to imagine that in the exercise of its Treaty making powers, a sovereign state may lack the capability to guarantee the level of exactitude required for strict conformity with each other's domestic legislation. I do not think it is outside the province of this Court to recognise the unique characteristics of this special type of contract and to recognise that the parties to it may not be always be in a position to guarantee strict conformity even with the best of negotiators, and the best understanding of each other's domestic laws.

[49] What was the intention of Parliament? Did it, in passing section 4(2), intend that an Order reciting a Treaty that was not on all fours with the Act, (the sections are identical in both Acts) would be invalidated by a lack of conformity, whether strict or otherwise? Both Acts require conformity generally, but, in particular, in relation to the restrictions on the return of fugitive offenders. Had it been the intention of Parliament that any type of non-conformity would be disabling, it would not have been necessary for the restrictions on the return of fugitives to be singled out as it did. This observation, taken by itself, would admittedly be insufficient to support an argument of broad conformity. In trying to understand Parliament's intentions as to the conformity it required, I must also have regard to the ineffective conclusive evidence and ouster clauses in section 4(3). It seems to me that Parliament was prepared to vouch for the astuteness of the Attorney General and of itself in assessing the conformity or lack of conformity between a Treaty and the Act. If strict conformity were required there would be no need for a conclusive evidence provision. The conclusive evidence provision suggests an implicit willingness to forgive minor instances of non-conformity and to put them beyond the reach of the court. It cannot have been that these clauses were put there with any sinister motive in mind. Of course, it is not beyond the reach of the court to examine the question of conformity but the conclusive evidence provision and ouster clause say something about the nature of conformity that Parliament envisaged. Insofar as principles of statutory construction are concerned extradition statutes ought to be given a broad and generous construction in order to facilitate extradition rather than obstruct it.

[50] An extradition Treaty is a unique extra-territorial device that attempts to create an intersecting Venn diagram between the legal systems of the two contracting parties. It seems to me that strict or precise conformity between domestic law and a Treaty hammered out with another sovereign country with a different legal system would be difficult to guarantee. This is what Mc Lachlin J said in *Kinder v. Canada (1991) 84 D.L.R. (4th) 438, at 488:*

> "While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.
>
> This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.
>
> Most importantly, our extradition process, while premised on our conceptions of what is fundamentally just, must accommodate differences between our system of criminal justice and the systems in place in reciprocating states. The simple fact is that if we were to insist on strict conformity with our own system, there would be virtually no state in the world with which we could reciprocate.
>
> Canada, unable to obtain extradition of persons who commit crimes here and flee elsewhere, would be the loser. For this reason, we require a limited but not absolute degree of similarity between our laws and those of the reciprocating state. We will not extradite for acts which are not offences in this country. We sign treaties only with states which can assure us that their systems of criminal justice are fair and offers sufficient procedural protections to accused persons. We permit our Minister to demand assurances relating to penalties where the Minister considers such a demand appropriate. But beyond these basic conditions precedent of reciprocity, much diversity is, of necessity, tolerated."

[51] *In Re Ismail [1999] 1 A.C. 320,* the meaning of the words "an accused person" in the UK Extradition Act 1999 was the subject of the dispute. Lord Steyn said this at pp. 326-327:

> "There is no statutory definition [of an 'accused' person]. It is however possible to state in outline the approach to be adopted. The starting point is that 'accused' in section 1 of the 1989 Act is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an 'accused' person. Next there is the reality that one is concerned with the contextual meaning of 'accused' in a statute intended to serve the purpose of brining to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: *R v. Governor of Ashford Remand Centre, Ex. p. Postlethwaite [1988] A.C. 924, 946-947.* That approach has been applied by the Privy Council to the meaning of 'accused' in an extradition Treaty: *Rey v. Government of Switzerland [1999] A.C. 54, 62G…*All one can say with confidence is that a purposive interpretation of 'accused' ought to be adopted in order to accommodate the differences between legal systems, in other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an 'accused' person is satisfied."

[52] In *Cartwright v. Superintendent of Her Majesty's Prison [2004] 1 W.L.R. 902, para. 15* Lord Steyn, speaking for a majority of their Lordship's Board, affirmed the principle that extradition treaties should be "purposively and liberally construed". He went on to say this:

> "But [counsel] argued that a different approach is necessary in regard to domestic extradition legislation. He made a comparison with criminal statutes and submitted that an approach of strict construction is necessary. The Board would reject this submission. Even in regard to criminal statutes, the presumption in favour of strict construction is nowadays rarely applied. There has been a shift to purposive construction of penal statutes; see *Cross, Statutory Interpretation 3rd ed. (1995) pp. 172-175.* In any event, it is a well settled principle 'that a domestic statute designed to give effect to an international convention should, in general, be given a broad and liberal construction': *The Antonist P Lemos [1985] A.C. 711, 731."*

[53] A broad and generous approach to the interpretation of extradition statutes was taken by the English Divisional Court in *Government of the Federal Republic of Germany v. Klein Schmidt [2006] 1 W.L.R. 1* and in *Government of Albania v. Bleta [2005] 1 W.L.R. 3576.*

[54] It seems to me that the level of conformity that is required should guarantee, in broad, not narrow or unduly precise terms, that an extradition Treaty does not compromise the fundamental rights of an accused person under domestic law. Exactitude beyond this goal does not seem reasonable to achieve in the context of such an agreement. I believe that this is the level of conformity that Parliament had in mind having regard to the intrinsic challenges of the intersecting Venn diagram of differing legal systems and the desirability of bringing transnational fugitives to justice. There are, as we will come to see, some differences between the Treaty provisions and the two Acts. These differences were presumably noticeable to the diplomats of both countries who negotiated the Treaty and to the executives who signed it. They were presumably also noticeable to the Attorney General who laid the Order in Parliament and the Parliamentarians, who failed or refused to pass a negative resolution. The question remains whether the differences are so severe—or so out of conformity with the 1985 Act (or the 2004 Act)—that the Order is void.

Principles of extradition

[55] In order to better understand the claimant's submissions that the USA Order is in conflict with the Act, it will be useful to more closely examine the core principles alluded to earlier that underlie extradition and which have been raised in this judicial review. These principles are condensed from readings of *Stanbrook and Stanbrook, Extradition Law and Practice, 2nd ed.* and *Botting op. cit.*

(1) Dual criminality- the offence must be a crime in both the Requesting and the Requested State. This rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the Requested State. The validity of this rule has never been seriously contested. It rests in part upon the basic principle of reciprocity, which underlies the whole structure of extradition, and in part, upon the maxim *nolla poena sine lege*- "no penalty without a law". One aspect of dual criminality is the principle of extra-

territoriality. It provides that an offence that occurs outside of a Requesting State may be an extraditable offence provided that "if it took place in corresponding circumstances outside Trinidad and Tobago it would be punishable under the laws of Trinidad and Tobago with death or imprisonment of a term not less than 12 months" (section 6(1)(b) of the 1985 and 2004 Acts)

(2) Non-inquiry- where an extradition Treaty exists, the fairness of the laws and judicial system of each country is assumed;

(3) Specialty- *Stanbrook and Stanbrook op. cit.* at p. 47 say this about specialty: "The rule which forbids the detention or trial of an extradited person, in the country to which he has been surrendered, for any offence committed prior to his surrender, other than that for which he was extradited, is a feature, expressly or by implication, of all extradition arrangements. It appears to be universally recognised and therefore merits the status of a general principle of international law. It serves three purposes: to protect the judicial process of the Requested Country against abuse, after it has relinquished its jurisdiction over the fugitive; to reinforce the double criminality rule and the "political offence" exception by making it formally illegal for charges to be brought in breach of the rule after the return, and to protect the fugitive from having to face a charge after his return of which he has not had notice and for which no *prima facie* case has been proved before the Requested Country's court. The application of the rule to individual cases has inevitably led to differing interpretations, both of the rule itself and of the formal exceptions to which it is subject."

(4) Minimum gravity- there must be a sufficient degree of seriousness for offences to be extraditable. This means, according to section 7(1) of the 1985 Act (and section 6(1)(a) of the 2004 Act) that the offence is punishable with death or a term of imprisonment for a term of no less than 12 months. This requirement provides an assurance that a person would not undergo the trauma of extradition for trivial offences.

The claimant's principal arguments

[56] Mr. Hosein submitted that the USA Order is not compliant with the 2004 Act. As I have already ruled, in answering the question whether the Attorney General had the jurisdiction to make the Order, the legislation that must be scrutinized is the legislation in force at the time that the Order was made, namely the 1985 Act.

[57] The claimant has identified four Articles of the Treaty that are not in conformity with the 2004 Act. He has also questioned the conformity of the Arrangement that the Attorney General made with the United States of America. In order to compare the Articles of the Treaty with the specific statutory provisions, it is necessary to set out the specific Articles and the specific statutory provisions. Where necessary, and for the avoidance of any doubt in the event that I am wrong about the correct comparator Act, I will set out the provisions of the 1985 Act and the 2004 Act.

<u>First alleged non-conformity: Article 2(1)</u>

[58] Article 2(1) of the Treaty provides, under the rubric *extraditable offences*:

> 1. An offence shall be an extraditable offence if, under the laws of Trinidad and Tobago, it is an indictable offence and if, under the laws of the United States it is punishable by deprivation of liberty for a period of more than one year or by a more severe penalty.

[59] This non-conformity is said to offend the "extraditable offence" rule. Mr. Hosein S.C. says that Article 2(1) is not in conformity with section 6(1)(c) of the 2004 Act. Section 6 of the 2004 Act provides as follows:

> 6(1) For the purpose of this Act, an offence for which a person has been accused or has been convicted in a declared Commonwealth territory or a declared foreign territory is an extraditable offence if—

(a) it is an offence against the law of that territory which is punishable under the law with death or imprisonment for a term of not less than twelve months;

(b) the conduct of the person would constitute an offence against the law of Trinidad and Tobago if it took place in Trinidad and Tobago, or in the case of an extra-territorial offence, if it took place in corresponding circumstances outside Trinidad and Tobago and would be punishable under the law of Trinidad and Tobago with death or imprisonment of a term of not less than twelve months; and

(c) in the case of a declared foreign territory, extradition for that offence is provided for by a Treaty between Trinidad and Tobago and that territory.

(2) …

(3) For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterised by the declared Commonwealth territory or the declared foreign territory in the same way as it is in Trinidad and Tobago. (emphasis added)

[60] The important difference between section 6 of the 2004 Act and its precursor, section 7(1) of the 1985 Act, concerns the identification of extraditable offences in declared foreign territories. The now repealed section 7(1) provided:

> 7(1) For the purposes of this Act an offence in respect of which a person is accused or has been convicted in a declared foreign territory is an extraditable offence if it is an offence which is punishable under the law of that territory with death or imprisonment for a term of not less than twelve months and which, if committed in Trinidad and Tobago or within the jurisdiction of Trinidad and Tobago would be one of the offences described in the First Schedule. (emphasis added)

[61] The First Schedule to the 1985 Act contains a long list of indictable offences. 30 items are listed. Some are specifically identified, for example, murder, rape, and piracy. Some are generically identified as offences against Acts that themselves contain numerous offences. For example, the Offences Against the Person Act, the Larceny Act, the Forgery Act and the Hijacking Act. One of the offences is broadly identified like this: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member or public officer of any company made criminal by any Act for the time being in force." This Schedule

attempts to enumerate every conceivable indictable offence that Parliament considered by its nature or character to be one for which a person may be extradited to a foreign territory. The system of classification is enumerative.

[62] Section 6(1)(c) of the 2004 Act replaced the enumerative schedule to the 1985 Act and made it a requirement "in the case of extradition to a declared foreign territory that extradition for that offence is provided for by a Treaty between Trinidad and Tobago and that territory." Mr Hosein contends that this means that Article 2(1) of the Treaty should have specified what offences constitute extraditable offences. There is no schedule of offences set out in Article 2 or anywhere else in the Treaty. Therefore, although the Treaty presciently uses the broad eliminative language of section 6(1)(a) and (b) of the 2004 Act, it does not specifically identify the offences.

[63] Assuming that the broad gamut of offences specified in the First Schedule of the 1985 Act represents a finite number of offences—which is difficult for this Court to certify—then Article 2(1) defines an extraditable offence in terms that, according to Mr. Hosein S.C., are much broader and potentially wider in scope. This is to say, that when Article 2(1) specifies that "<u>An offence shall be an extraditable offence if, under the laws of Trinidad and Tobago, it is an indictable offence</u> and if under the laws of the United States it is punishable by deprivation of liberty for a period of more than one year or by a more severe penalty" (emphasis added) the expression "indictable offence" suggests any conceivable indictable offence, including those that would not have fallen under the preferred enumerative umbrella of the First Schedule of the 1985 Act.

[64] I do not accept this argument. In the first place, as indicated before, the First Schedule appears to be an exhaustive list of almost every conceivable indictable offence. To the extent that there are any indictable offences under our law that Article 2(1) purports to capture that are not included in the First Schedule, these offences must be small in number. Secondly, Article 2(1), at the time that the Order was made in 2000, did not put the Executive of this country under any obligation to accede to a request for extradition for any offence not listed in the First Schedule to the 1985 Act. The process of

extradition is a judicial process conducted before our country's judicial officers and both Acts contain exhaustive mechanisms for review and appeal in the event that a Magistrate grants extradition for an offence not listed in the First Schedule. This would have been the position in 2000 when the Order was made and, according to my understanding, as I have said before, the assessment of the Attorney General's jurisdiction is confined to that year.

[65] For the sake of completeness, I will examine these thoughts in relation to the 2004 Act. The definition of an extraditable offence in section 6(1)(c) of the 2004 Act, requires that, in relation to a foreign territory, an extraditable offence is "provided for" in the Treaty. Section 6(1)(c) does not stipulate that the Treaty should tabulate the offences. If that was Parliament's intention it would have said so. It also cannot legitimately be said that the Article 2(1) definition has created a rudderless extradition scheme for crimes of any perverse or unknown character. There is a definition in Article 2(1) and, broadly speaking, it is this: an extraditable offence is an indictable offence under the laws of Trinidad and Tobago. That is a definition. And the Treaty has "provided" it, in compliance with section 6(1)(c) of the 2004 Act. The negotiating parties elected to provide for extraditable offences by using the broad term "an indictable offence under the laws of Trinidad and Tobago" and not to laboriously list each offence. It does not seem to me that by using this wording the treaty makers could be said to have not "provided" a definition and to be so out of conformity with the 2004 Act as to make the Order voidable.

[66] Further, insofar as there is any non-conformity between Article 2(1) and section 7 of the 1985 Act (or section 6(1)(c) of the 2004 Act), the effect of the non-conformity must not, it seems to me, be considered in isolation. It must be demonstrated that the non-conformity on paper will create the type of catastrophe in the real world for the claimant that Mr. Hosein is fearful of. I respectfully do not share those fears. The Treaty is not part of our domestic law. Neither the Attorney General, nor the magistrate, is legally bound by any of its provisions. Every accused person is entitled to the due process

protections in our legislation that were championed by the Court of Appeal in *Ferguson.* Treaty obligations can never override domestic law obligations whether with regard to the identification of charges under the ATP or the judicial processes that follows its issuance. One must approach the question of alleged non-conformity from a position of complete assurance in our judicial processes under domestic law and not from any unreasonable suspicions about the institution of perverse or unfamiliar charges based upon a document that has not entered our law. If a Warrant of Extradition is signed by the Attorney General, it will be in accordance with our domestic law, not the Treaty.

Second alleged non-conformity: Article 2(4)

[67] Article 2(4) says this:

> 4. If the offence was committed outside the territory of the Requesting State, extradition shall be granted if the laws in the Requested State provide for the punishment of an offence committed outside its territory in similar circumstances. If the laws in the Requested State do not so provide, the executive authority of the Requested State may, in its discretion, grant extradition, provided the requirements of this Treaty are met. (emphasis added)

[68] Mr. Hosein says that this does not conform with section 6(1)(b) of the 2004 Act. As already set out, this section prescribes that an extraditable offence is one where, *inter alia*:

> "the conduct of the person would constitute an offence against the law of Trinidad and Tobago if it took place in Trinidad and Tobago, or in the case of an extra-territorial offence, if it took place in corresponding circumstances outside Trinidad and Tobago, and would be punishable under the law of Trinidad and Tobago with death or imprisonment for a term of not less than 12 months."

[69] The argument here is that the 2004 Act does not permit the Executive to allow extradition for extra-territorial offences that would not be punishable in Trinidad and Tobago if it had been committed outside this country's jurisdiction. This is said to offend against the principle of dual criminality, since extra-territoriality is a facet of this wider rule. It is also contended that Article 2(4) makes no provision for the requirement of minimum gravity with respect to an extra-territorial offence. It was submitted that the restrictions placed on extraditions for extra-territorial offences should not be minimised because we live in an age where the extra-territorial reach of many countries is widening and sometimes jurisdiction can be claimed on the most tenuous of bases.

[70] Mr. Mendes contended that that part of Article 2(4) that is said to lack conformity is entirely discretionary. He says that the Executive may or may not grant extradition for an extra-territorial offence. He also says that Article 2(4), notwithstanding the inclusion of the discretion granted to the Executive, nevertheless contains a condition, namely, "that the requirements of this Treaty are met". According to his submission, this means that the offence, at the very least, must otherwise conform to the definition of an extraditable offence.

[71] There is dissonance between Article 2(4) and section 7(1) of the 1985 Act. Section 7(1) makes no provision for extra-territorial offences. What Article 2(4) does is give a discretion to the Executive to allow extradition for an extra-territorial offence.

[72] I prefer Mr. Mendes' arguments on this point. Considering firstly, the 1985 Act, it cannot be disputed that the Treaty, not being part of domestic law, obligates the Attorney General to extradite any person for an extra-territorial offence. He is given a discretion and it must be assumed that he will exercise it in accordance with domestic law. Insofar as the Treaty negotiators decided to grant the Attorney General a discretion to extradite for an extra-territorial offence, they must be taken to have had knowledge of section 8(3)(c) of the 1985 Act that was operative at the time of negotiation, which grants the Executive, in the person of the Attorney General, to permit trial of an extradition offence even though not originally the subject of the return. In purporting to act in reliance on a

discretion granted by a Treaty, it must be presumed that the Executive would consider itself bound, at the time of entering the Treaty, by the domestic law. Any attempt prior to 2004 to extradite a person for an extra-territorial offence based upon the non-obligatory discretionary power in Article 2(4), would have been met by a legal challenge and, in my opinion, the inclusion of extra-territorial offences in the Treaty posed no threat to an accused person. The argument that this provision in Article 2(4) might influence the determination of a foreign court post-return is not persuasive, as extra-territoriality in the Treaty is at the discretion of our Executive and not the foreign prosecutors. In this sense, Article 2(4) does not raise a red flag in my mind. The domestic law safeguards in the 1985 Act adequately circumscribe the exercise of this discretion. Moreover, extra-territorial offences are now by section 6(1) of the 2004 Act, permissible extraditable offences. In fact, whereas the Treaty provided for the Executive's discretion to extradite for extra-territorial offences, section 6(1) of the 2004 Act now makes it plain, without the cover of any discretion, that extra-territorial offences are extraditable offences.

Third alleged non-conformity: Article 2(5)

[73] Article 2(5) of the Treaty provides as follows:

> 5. If extradition has been granted for an extraditable offence, it shall also be granted for any other offence specified in the request even if the latter offence is punishable by one year's deprivation of liberty or less, provided that all other requirements for extradition are met.

[74] The non-conformity is said to offend the specialty rule and the minimum gravity rule. Under this Article, Trinidad and Tobago committed itself to extradite persons for offences punishable in the United States by imprisonment for less than a year, as long as a decision to extradite for an extraditable offence had already been made and as long as the minor offence has been specified in the request. Mr. Mendes conceded that this Article is inconsistent with section 7(1) of the 1985 Act, which limits extradition to offences punishable in the United States of America by death or imprisonment for at least 12 months. Mr. Hosein, consistent with his argument that the non-conformity must be

evaluated with the 2004 Act, drew the Court's attention to section 6(1)(a) and (b) of the 2004 Act. He submitted that the wording of Article 2(5) is an egregious departure. Quoting from his written submissions: "Thus for example, if a crime that would only merit a minor punishment in Trinidad and Tobago is included in the extradition request, this would not present a bar to prosecution in the United States courts which can go on to penalise the accused to the fullest extent permissible under United States law, in respect of minor offences that would not have even been extraditable in this country." He further suggested as an alternative scenario that an accused person might be exonerated in the United States for all extraditable crimes, but prosecuted and punished for a relatively minor offence thus prolonging the invasive effects of extradition. He conceded that section 8(3)(b) of the 2004 Act nonetheless allows extradition for "any lesser offence proved before the Magistrate on proceedings under section 12" but says that there is nothing in Article 2(5) which retains this important proviso. He submitted that States do not and cannot be expected to be concerned with the contents and reaches of each other's domestic laws, which, in many cases, may not be readily apparent. But Mr. Hosein strongly argued in his written submissions that "states are expected to examine and adhere to the terms of their Treaty arrangements". He cited the Irish case of *AG v. Russell [2006] IEHC 164.* Peart J, sitting in the High Court of Ireland, noted an acknowledgment and acceptance of the principle by US Circuit Judge Beezer, particularly with respect to the specialty principle. The following passage from the judgment of Peart J was included in the claimant's submissions:

> "Circuit Court Judge Beezer referred to what he called 'the doctrine of specialty':
>
> > 'The doctrine is based on principles of international comity; to protect its own citizens in prosecutions abroad the United States guarantees that it will honour limitations placed on prosecutions in the United States…Our concern is with ensuring that the obligations of the requesting nation are satisfied."
>
> In that regard the judge then referred to another case, namely *US v. Najohn 785 F.2d 1420*…in which it is stated 'Because of this, the protection exists only to the extent that the surrendering country wishes.' He went on to state that it was necessary to look at the Treaty itself in

order to determine the protection which an extradited person is afforded under the rule of specialty.

[75] However, Peart J completed his reference to US Circuit Judge Beezer's comments, a passage omitted in the claimant's written submissions, by saying this:

> "The judge [Circuit Judge Beezer] referred to the portion of the rule in the Treaty with Uruguay at which it is provided that a person 'shall not be prosecuted…for an offence other than that for which extradition has been granted…unless…the requested party has manifested its consent to his detention, trial or punishment for an offence other than that for which extradition was granted…'
>
> That clause is mirrored in Article XI of the Treaty between Ireland and the United States where there is a similar prohibition 'unless…the Requested State has consented.' The question of consent has not arisen in the present case.
>
> The Court [US Circuit Court] also agreed with the [Uruguayan] government's submission that the appropriate test in relation to [the accused] was whether Uruguay would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited. The judge expressed the view that by adding more counts of money laundering to the indictment, there was no breach of the rule of specialty and that Uruguay would not regard it as a breach. This was because the superseding indictment did not alter either the nature of the scheme alleged nor the particular offences alleged, and the only significant difference between the two indictments was that the superseding indictment was more specific as to the nature of the money laundering scheme and contained added substantive counts of money laundering which were identical to those in the original indictment." (emphases added)

[76] The relevance of Circuit Judge Beezer's comments that were relied on in *Russell,* insofar as it deals with specialty, is restricted to the particular wording of Article XI of the US Treaty with Uruguay. The point being made by the claimant is that the United States of America, on the basis of Article 2(5), can breach the rule of specialty by prosecuting additional offences that were not included in the request. The claimant is contending that he may face these additional charges post extradition because the United States government, if in doubt, would look to the Treaty to determine whether additional charges could be laid.

[77] To like effect, the claimant also relied on the case of *Welsh v. Secretary of State for the Home Department [2007] 1 W.L.R. 1281*. In this case the appellants were alleged to have been engaged in investment scheme frauds to the detriment of persons in the United States of America. The US government requested their extradition on the basis of a 63-count indictment, which included various offences of conspiracy, wire and mail fraud and money-laundering. The conduct underlying the counts was translated in 88 charges under English law. Half of the charges were discharged by the District Judge as not constituting offences known to English law. The District Judge sent the remaining charges to Secretary of State for the Home Department, who ordered extradition. At the time of the decision, the United States, under the UK Extradition Act 2003, was a country to which no extradition could be ordered in the absence of "specialty arrangements". The appellants contended *inter alia* that after their return to the United States, the US authorities will "deal with them" in breach of the specialty rule by further indicting and then trying them for offences which did not form part of the extradition request and for which they could not have been extradited, and would use evidence relating to non-extraditable offences to prove the extradition offences. Ouseley J, in a remarkably well-researched and lucid judgment, dismissed the appeals against extradition. He held that the absence of consent to prosecute for additional charges would be a breach of the specialty rule but that there was no basis for supposing that the requirement for consent by the Secretary would be ignored by the US authorities. He further held that the specialty rule did not limit the evidence which could be admitted to prove the extradition offence and that the rules which govern the admissibility of evidence were those of the trial State. Ouseley J also held that how a person was "dealt with" in relation to extradition and punishment demanded a purposive and flexible approach which must be capable of accommodating the reasonable range of sentencing practises and values which other countries adopted.

[78] The alarm bells that the claimant is ringing certainly are not echoed in these two cases. One of the appellants' arguments in *Welsh* was that the United States "habitually violated" the spirit and purpose of the specialty rule. The appellants' argument in *Welsh*

was drawn from *Bassiouni, International Extradition: United States Law and Practice, 4th edn., (2002) p. 546.* According to Ouseley J, "He (Mr Bassiouni) was said to be a renowned expert on this topic". The judge then described the submission as not even "remotely justified." In analysing many US cases, he disproved that analysis of the US justice system. He concluded as follows:

> [After citing *United States v. Andonian (1994) 29 F 3d 1432*]: "The importance of those comments is not that the US courts second guess the attitude of foreign governments or courts still less do they go behind what has been authorised in the extradition." (at para 43, p. 1293)
> …
> That part of the decision shows a careful adherence to the specialty rule and to the extradition authorised." (at para 43, p. 1293)
> …
> "What the decision pre-trial and on appeal shows is a concern to abide by the terms of the extradition authorisation and not to act in a way which would be regarded as a breach of faith as embodied in the Treaty obligations." (at para 45, p. 1293)

[79] Ouseley J also dealt with another of the claimant's fears, which are triggered by Article 2(5), namely, that some superseding indictment will be filed in the United States after his return, which did not form part of the extradition request. He examined a number of leading cases in the United States and concluded:

> "As described in *Fiocconi 462 F 2d 475, 480* since the object of the rule was to prevent the United States violating international obligations, 'it becomes essential to determine, as best one can, whether the surrendering state would regard the prosecution as a breach." (at para 47, p. 1294)

[80] He concludes his analysis of *Fiocconi* like this:

> "The case exemplifies the US courts' approach of ascertaining the attitude of the sending state so as to prevent the trial of someone for an offence which it would consider outside its act of extradition. The US courts do not in principle regard it as a breach of specialty to try someone for an offence which was different from the extradition offence or the conduct disclosed by the extradition request, at least, if the new offence is of the same character as the extradition offence, but subject to two important provisos: first, that such a trial should not be excluded by the Treaty or act of extradition and second, that the sending state should not have objected or would not object to such a trial. The US courts do not turn a blind eye

> to objections but seek, case by case, country by country, to ascertain the sending state's attitude from the available materials."

[81] In my opinion, Article 2(5) has nothing to do with the specialty rule and many of the fears that the claimant expresses about it are exaggerated. The submission that the US would arbitrarily and without referral back to the Requested State, indict the claimant for superseding crimes or for crimes that do not meet the minimum gravity requirement is unsupported. Like Ouseley J, I do not consider that the United States' justice system will go rogue and act outside of its well-developed doctrines of the rule of law. Like the courts of this country, the United States courts will endeavour to have due regard to the principles of comity and reciprocity and in the absence of any evidence to the contrary, I must assume that the laws and judicial system of the United States of America is fair. The extradition rule or principle of non-inquiry is applicable here.

[82] In any event, Article 2(5) refers to the grant of extradition for an extraditable offence and provides that if extradition has been granted, it shall also be granted for any other offence specified in the request even if the latter does not meet the minimum gravity test. The grant of extradition takes place in this country and nowhere else. For an extradition to be granted it must be granted under our legislation. The officer who grants it is a judicial authority who will apply the domestic law and not the Treaty. The governing definition of an extraditable offence is found in Article 2(1). If one of the contracting states decides to grant extradition for an offence, which falls within the definition of "extraditable offence" in Article 2(1), the grant would be subject to the extradition process in the 1985 and 2004 Acts. It does not create any domestic law obligations to do so and it does not speak of any post-extradition processes in the foreign territory. It is restricted to the pre-extradition processes in the Requested State.

[83] In my opinion, Article 14 is the critical source of understanding of the rule of specialty and not Article 2(5). Article 14, which appears under the rubric "Rule of Speciality", provides as follows:

> 1. A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for—
>
> > (a) the offence for which extradition has been granted or a differently denominated offence based on the same facts on which extradition was granted, provided such offence is extraditable, or is a lesser included offence;
> >
> > (b) an offence committed after the extradition of the person; or
> >
> > (c) an offence for which the executive authority of the Requested State consents to the person's detention, trial, or punishment. For the purpose of this subparagraph—
> >
> > > (i) the Requested State may require the submission of the documents called for in Article 7; and
> > >
> > > (ii) the person extradited may be detained by the Requesting State for sixty days, or for such longer period of time as the Requested State may authorise, while the request is being processed.
>
> 2. A person extradited under this Treaty may not be extradited to a third State for an offence committed prior to his surrender unless the surrendering State consents.
>
> 3. Paragraphs 1 and 2 of this Article shall not prevent the detention, trial, or punishment of an extradited person, or the extradition of that person to a third State, if—
>
> > (a) that person leaves the territory of the Requesting State after extradition and voluntarily returns to it; or
> >
> > (b) that person does not leave the territory of the Requesting State within thirty days of the day on which that person is free to leave.

[84] Taken as a whole, Article 14(1) prohibits the Requesting State from detaining, trying or punishing the person extradited other than, for, *inter alia,* "the offence for which extradition has been granted." Under Article 2(5), the offence for which extradition would have been granted would include such other offences specified in the request for extradition even though they may not meet the severity requirement for extradition offences. Article 2(5) is therefore not inconsistent with the specialty rule since it does not expand the offences for which the extradited person may be detained, tried or punished,

that exceed those that the Requested State has authorised. While Article 2(5) creates a pre-extradition obligation, it does not violate the specialty rule by creating any right in the Requesting State to detain, try or punish the fugitive after his extradition.

[85] Further, Article 2(5) does not deviate from section 8(3) of the 1985 Act, which prohibits the extradition of anyone unless there is in existence a law in the Requesting State ("a specialty law"), or an arrangement made with the Requesting State ("a specialty arrangement"), prohibiting the prosecution of the fugitive in the requesting state for offences other than those listed in section 8(3), namely, the offence in respect of which he is returned, any lesser offence proved by the facts proved before the Magistrate on proceedings under section 12, or any other offence being an extraditable offence in respect of which the Attorney General may consent to his being so dealt with. It follows that if a specialty law or a specialty arrangement is not in place, a person may not be returned.

[86] Section 8(3) of the 1985 Act contains the specialty rule. Article 2(5) deals with Trinidad and Tobago's obligation under the Treaty to extradite. As indicated earlier, it has nothing to do with the limitation of the offences for which a fugitive may be tried after he has been extradited. It is concerned solely with the pre-surrender grant of extradition under domestic law. Mr. Mendes conceded that Article 2(5) is inconsistent with section 7(1) of the 1985 Act (and section 6(1) of the 2004 Act) but I share his view that the inconsistency does not sufficiently derogate from the domestic law safeguards for a fair and just extradition process. Article 2(5) expresses a non-binding obligation to extradite for a minor offence provided that the Magistrate has granted extradition for an extraditable offence pursuant to the judicial process in both Acts and, importantly, provided also that all other requirements for extradition are met. The Magistrate hearing the case or the Attorney General who is considering the signing of a warrant, will be mindful of our domestic law and if either of them are not, their decision is reviewable. It is therefore an exaggeration to identify Article 2(5) as being so out of conformity with both Acts as to amount to a breach of the claimant's fundamental rights to due process under the Constitution. I note as well in passing, that even if a request is made for

extradition for a minor offence, Article 7, which deals with the level of proof of commission and Article 8, which deals with the admissibility of evidence in extradition proceedings, obligates the Requesting State to come to satisfactory proof before the Magistrate. And, I must again repeat, our judicial officers are beholden to the domestic law and not to any expression of hope in a Treaty that is not part of our domestic law.

[87] In sum, the level of non-conformity between Article 2(5) and either of the Acts is not sufficient, in my view, to justify the voiding of the Order.

Fourth alleged non-conformity: Article 14(1)(a)

[88] Mr. Hosein argues that Article 14(1)(a) (see [83] above for its wording) provides a pathway whereby the specialty principle as demarcated in this country can be circumvented. He says that this Article conflicts with section 8(3) of the 2004 Act.

[89] Section 8(3)(4) and (5) of both Acts provides as follows:

> (3) A person shall not be returned under this Act to a declared Commonwealth or foreign territory, or committed to or kept in custody for the purposes of the return, unless provision is made by the law of that territory, or by an arrangement made with that territory, that he will not, until he has left or has been free to leave that territory, be dealt with in that territory for or in respect of any offence committed before his return under this Act other than—
>
> > (a) the offence in respect of which he is returned;
> >
> > (b) any lesser offence proved by the facts proved before the Magistrate on proceedings under section 12; or
> >
> > (c) any other offence being an extraditable offence in respect of which the Attorney General may consent to his being so dealt with.
>
> (4) The Attorney General shall not give his consent under subsection (3)(c) if he has reasonable grounds for believing that the offence to which the request for consent relates could have been charged prior to return if due diligence had been exercised.

> (5) Any such arrangement as is mentioned in subsection (3) may be an arrangement made for the particular case or an arrangement of a more general nature; and for the purposes of that subsection a certificate issued by or under the authority of the Attorney General confirming the existence of an arrangement with any territory and stating its terms is conclusive evidence of the matters contained in the certificate. (emphasis added)

[90] The part of Article 14(1)(a) that sounds the alarm bell for the claimant is the provision that a person who has been extradited may be detained, tried or punished in the Requesting State for the offence for which the extradition was granted or—this is the material deviation—a differently denominated offence based on the same facts on which extradition was granted, provided such offence is extraditable, or is a lesser included offence." The claimant submitted that the phrase "differently denominated offence based on the same facts on which extradition was granted" even though subject to the proviso that the offence must be "extraditable"

> "is obviously both wide and highly nebulous. It leaves much room for subjectivity on the part of foreign prosecutors as to whether the offence was in fact based on the same facts on which extradition was granted."

[91] The claimant submitted that it is not realistic to expect that the foreign prosecutor would adopt a fastidious investigation into whether the differently denominated offence is indeed extraditable. The nub of the claimant's complaint is that the phrase "differently denominated offence" means that he will face the risk of additional charges in the United States of America after his extradition without the need for the Requesting State to seek the consent of the Attorney General as required by section 8(3)(c) of both Acts. The fear is that these differently denominated offences would not be extraditable offences under our law.

[92] I am not persuaded by this argument and I accept Mr. Mendes' submissions on this point. Section 8(3)(b) requires a specialty law or arrangement which would permit the returned fugitive to be dealt with for "any lesser offence proved by the facts proved before the Magistrate on proceedings under section 12." There is no requirement in section 8 that such offence be itself an extraditable offence. Since a lesser offence must be proved by

the same facts that are laid before the Magistrate, the evidence establishing the lesser offence would logically include the facts relied on to establish the commission of the extraditable offence.

[93] In any event, putting aside the technicalities and the laborious definitions, extradition is based upon the conduct of individuals, however described or articulated in penal statutes, that amount to a crime in Trinidad and Tobago. To be clear, extradition is conduct based: *Norris v. Government of the United States of America [2008] 1 A.C. 920, para. 73*. The Magistrate sitting in Trinidad and Tobago, will not ask himself or herself whether the alleged conduct of the accused person constitutes the United States offence. The Magistrate is not even slightly concerned whether the offence for which extradition is sought carries an identical or even similar name to those provided under Trinidad and Tobago law. He or she will assess the evidence of the accused's conduct according to Trinidad and Tobago law, and the Attorney General will extradite the accused person for that offence. The Trinidad and Tobago offence may therefore bear an entirely different nomenclature to the one specified in the extradition request. It is the unavoidable duty of the United States prosecutor to try the accused for the appropriately denominated offence under United States law. It would be unreal to expect the level of required uniformity in the denomination of offences between the individual States that comprise the United States of America, far less between Trinidad and Tobago and the United States of America. In my opinion, Article 14(1)(a) is simply recognising this reality and conforms to section 8(3) of both Acts.

[94] The offences for which a person may be extradited are, by section 8(3), those provided for by the law of the requesting state or by an arrangement made with that territory. There is no requirement that the arrangement must be embodied in the Treaty. Further, section 8(3) prohibits the return of a fugitive unless a specialty law or arrangement is in place. Article 14(1) (and for that matter Article 2(5)) do not legitimise extradition in the absence of a specialty law or arrangement that limits prosecution in the United States to section 8(3) offences. So the Treaty would only be out of conformity if it permitted

extradition in the absence of such law or arrangement. Article 14(1) and Article 2(5) in no way abrogate or conflict with the need for such a law or arrangement.

Fifth alleged non-conformity: the flawed arrangement

[95] During the *inter partes* hearing of the application for leave to apply for judicial review, the claimant was for the first time notified that an Arrangement had been entered into in respect of the request for extradition. Despite requests for disclosure of the Arrangement, it was never disclosed, and instead a Certificate dated 21 September 2015 signed by the Attorney General, was given to the claimant's attorneys pursuant to section 8(5) of the Act. For purposes of clarity I will repeat the wording of section 8(5):

> (5) Any such arrangement as is mentioned in subsection (3) may be an arrangement made for the particular case or an arrangement of a more general nature; and for the purposes of that subsection a certificate issued by or under the authority of the Attorney General confirming the existence of an arrangement with any territory and stating its terms is conclusive evidence of the matters contained in the certificate.

[96] Mr. Hosein has submitted that the question before the Court is the conformity between the 2004 Act and the Treaty. There is nothing in the Treaty that speaks to an Arrangement and he therefore suggests that the Arrangement is an *ad hoc* attempt to cure any potential speciality defects in the Treaty that exposed the claimant to the risk of prosecution for non-extraditable offences, post extradition. The claimant surprisingly describes the Arrangement as being in conflict with the Treaty, despite the clear authority to enter into such an Arrangement in section 8(5) of both Acts. He says that "serious and obvious problems can hypothetically arise where conflict exists between a Treaty and an *ex post facto* Arrangement." He posits as hypothetical examples that the United States authorities may disregard the Arrangement and rely solely on the Treaty. He again cites the *Bassiouni* textbook as his authority in which the author suggests that the Treaty is binding upon the judiciary of the Requesting State. He further submits that the Arrangement contained in the Certificate may not carry the same weight as a Treaty in a

foreign country and describes it as similar to an undertaking or assurance lacking legal force.

[97] Although the claimant accepts that section 8(5) gives the Attorney General the option of producing a certificate as opposed to disclosure of the actual Arrangement, he says that there are still risks if there is conflict in the wording between the Treaty and the actual Arrangement, which has not been produced. He postulates the following hypothetical scenarios:

- What is the approach of a foreign court when there is a conflict between a Treaty and an Arrangement?
- Will the foreign court try to give an interpretation that reconciles a Treaty and "a contradictory Arrangement"?
- Will the foreign court be bound instead by the Treaty?

[98] I turn my mind back to the comprehensive analysis of the US justice system undertaken by Ouseley J in *Welsh*, and to his lack of complete assurance in Mr Bassiouni as a renowned authority on this subject, and am sufficiently persuaded that the United States prosecutors and justice system do not act capriciously and are very mindful of the wishes of the Requested State. The Arrangement is made with the Requesting State and there is no reason to doubt that it lacks legal force. Having regard to the principles of reciprocity I seriously doubt that it lacks legal force, or would be ignored by the US authorities. To believe that is to doubt the fundamental feature of comity between nations in the extradition process and the continuing obligations of both countries to preserve relations in that process. I find it difficult to believe that the Arrangement that the Attorney General has certified will carry less weight than the Treaty in the offices of the United States prosecutor. Indeed, having closely studied *Welsh*, I feel confident that the Arrangement will have equal or more weight than the Treaty. To my mind it fully neutralizes the fears about breaches of the rule of speciality.

[99] I also have no reason to doubt that the Certificate properly captures meaning of the Arrangement made between the two governments. No reason has been given to me, short

of speculation, why I should hold that the Certificate fails to capture the meaning or wording of the Arrangement. In the absence of such evidence, I have no reason to doubt, far less to speculate, that there is any material variance between the language in the Arrangement and the language in the Certificate. To hold otherwise would be to question the sincerity of the Attorney General's Certificate and there is no evidence to support such a conclusion.

[100] The prospect of being extradited will naturally produce trauma in any individual, but it is a sad reality that someone may be compelled, against their wishes, to face trial in a foreign country. It is easy to understand why such an event would provoke anxiousness, fear, and trepidation. These are understandable and legitimate emotional responses that flow naturally from the upheaval of a threatened extradition. The scenarios postulated by the claimant's attorneys with respect to the Arrangement are all hypothetical. *Bassiouni* seems to be describing the United States' judicial system as if it were intrinsically brutish, conniving, and ungoverned by the rule of law. His analyses, which the claimant relied on heavily, do not seem to me to be balanced. They seem tendentious. This Court is therefore not prepared to accept the criticism levelled against the Attorney General's Certificate.

(3) Whether the claimant is entitled to make representations to the Attorney General before he decides to issue an ATP.

[101] It is the claimant's contention that he ought to have been given an opportunity to be heard by the Attorney General before he signed the ATP. A number of well-known authorities in support of this right were advanced and I have no reason to doubt the high authority from which those cases emanated. So, it is perfectly acceptable that fairness demands that a person whose interests might be affected by a decision should be given an opportunity to be heard: *Permanent Secretary & Ors. v. Ramjohn [2011] UKPC 20 [39]*. I also have no hesitation in holding that a right to be heard vindicates the rule of law: *Diedrichs-Shurland & Anor. v. Talanga-Stiftung & Anor. Privy Council App. No. 22 of 2005*. It is likewise perfectly acceptable that the Court must not ask itself the question

whether the decision maker would have come to a different decision had the right to be heard been granted: *Diedrichs-Shurland* and *R v. Chief Constable of the Thames Valley Police ex. p. Cotton [1990] IRLR 344.*

[102] It is not doubted that Mr. Al-Rawi, as the current Attorney General, had a duty to adjudicate upon the request from the United States of America and that the claimant would be adversely affected if he decided to issue the ATP. The claimant has argued that he was entitled to receive copies of all the documents establishing the offences which are set out at Article 7 of the Treaty that supported the issuance of the ATP. It is an exhaustive bundle of documents that presumably includes the allegations of misconduct that prove the crimes and the supporting law. The Magistrate will assess these documents. The claimant also contends that he was entitled to receive copies of the documentation that supported the provisional warrant of arrest.

[103] I have already recited in the factual background the events that preceded the issuance of the ATP. I have referred to the correspondence that passed between the parties. To my mind, the critical letter is the one sent by the current Attorney General on 14 September 2015. It gave the claimant an opportunity to be heard before the issuance of the ATP but this offer was made conditional upon the claimant agreeing to consent to an extension of the timeframe imposed by a magistrate for the Attorney General's determination. The claimant contends that the effect of such an extension of time would have been to further extend the infringement of his liberty by being made to remain on bail. It was on this basis that the claimant declined the opportunity to be heard.

[104] I find it difficult to understand why the claimant's attorneys refused the opportunity to be heard for the reasons they have given. The claimant was on bail and the allegation that the extension of time would have compromised his liberty exists only on the esoteric plane of legal theory. In real terms, the extension of time would have made little to no difference to the claimant's ability to move freely about the country. An unlimited extension of time was not being sought, and, in any event, since the extension was being

fixed by the Magistrate, the claimant would obviously have a say on the question of its duration. The right to be heard, if it exists in a case like this, was not withheld, and the conditionality for its grant, in practical terms, was not severe or injurious.

[105] But I doubt, nonetheless, that a person facing extradition has a right to be heard before the issuance of an ATP. In the ordinary criminal law context—and extradition is a criminal law procedure—this would be akin to previewing and commenting upon the charge that a constable intends to lay before a Magistrate. The constable either has the proof or he doesn't. The Magistrate will decide. After the charge is laid before the Magistrate the legal right to be heard is triggered, not before.

[106] Importantly, no such right is provided for in either of the Acts. In *R v. Home Secretary, ex. p. Norgren [2000] Q.B. 817,* Lord Bingham CJ (as he then was) said this:

> The statutory scheme makes no provision for representations to be made by the object of an extradition request before an order to proceed is issued. *Reg v. Secretary of State for the Home Department, Ex parte McQuire* (*1995) 10 Admin.L.R. 534, 537* highlights the general undesirability of prolonged representations and counter-representations at this stage. There was, so far as we know, no contact between the Home Secretary and the applicant or his solicitors before the provisional warrant was issued and executed, and such contact would not be normal. After the arrest of the applicant and service of the relevant documents upon him, the Home Secretary did not invite representations. Such representations were volunteered on behalf of the applicant and were considered. The applicant's solicitors shrewdly sought reassurance that the Home Secretary would grant them an opportunity to make further representations if a renewed request were made by the United States Government, but no reassurance was forthcoming and the situation was not one in which silence could be taken to indicate assent. It is not standard practice in an ordinary domestic context to warn a person of his impending arrest. Where the extradition of the party in question is sought on the grounds that he is a fugitive criminal there are obvious practical reasons for not giving such notice. The Home Secretary never led the applicant or his solicitors to think that an opportunity to make further representations would be granted. They were entitled to hope that such an opportunity would be granted, but not to expect it. In our view the Home Secretary was not guilty of procedural unfairness in acting as he did.

[107] The claimant was not entitled in law to be heard but nonetheless declined the invitation that was extended to him. I am not satisfied that he was justified in refusing the invitation that was extended to him. The offer that was made was voluntary and not unconditional. If he wished to be heard, he could easily have accepted the condition.

Disposition

[108] Having regard to these findings, I must dismiss the claimant's application for judicial review. Costs will follow the event and I will now hear Counsel on the question of its quantification. I also invite both Senior Counsel to address me on the issue of the continuation of the stay of the extradition proceedings before the Magistrate.

James Christopher Aboud

Judge